REPORTABLE

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

\+ **LETTERS PATENT APPEAL NO. 1229 OF 2006**

% **Date of Decision** : 9th February, 2007.

Sh. Dhanpal Singh Nagar .... Appellant.
Through Dr.R.R.Kishore with Mr.Gulab Chandra, Advocates

VERSUS

Food Corporation of India & Ors.... Respondents.
Through Mr. Jagat Singh with Mr.Ritesh Sharma, Advocates.

CORAM:
HON'BLE DR. JUSTICE MUKUNDAKAM SHARMA, CHIEF JUSTICE
HON'BLE MR.JUSTICE SANJIV KHANNA

1. Whether Reporters of local papers may be allowed to see the judgment?

2. To be referred to the Reporter or not ? Yes.

3. Whether the judgment should be reported in the Digest ? Yes.

SANJIV KHANNA, J :

1. The present Appeal by Mr. Dhanpal Singh Nagar (hereinafter referred to as the appellant, for short) is directed against judgement dated 22nd November, 2005 in Writ Petition (Civil) No. 521/1992. By the impugned judgement learned Single Judge has dismissed the aforesaid writ petition and inter alia held that as per the provisions of Section 12A of the Food Corporation of India Act, 1964 (hereinafter referred to as the Act, for short) the appellant is entitled to retirement and terminal benefits admissible to employees of the Food Corporation of India (hereinafter referred to as the Corporation, for short) and he is not entitled to the retirement and terminal benefits admissible to the Central Government employees.

2. Learned counsel for the parties in the present Appeal drew our attention to Section 12A of the Act which is reproduced below:-

> 12A. **Special provisions for transfer of Government employees to the Corporation in certain cases.**
>
> (1) Where the Central Government has ceased or ceases to perform any functions which under section 13 are functions of the Corporation, it

shall be lawful for the Central Government to transfer, by order and with effect from such date or dates (which may be either retrospective to any date not earlier than the 1st January, 1965, or prospective) as may be specified in the order, to the Corporation any of the officers or employees serving in the Department of the Central Government dealing with food or any of its subordinate or attached offices and engaged in the performance of those functions:

Provided that no order under this sub-section shall be made in relation to any officer or employee in such Department or office who has, in respect of the proposal of the Central Government to transfer such officer or employee to the Corporation, intimated within such time as may be specified in this behalf by that Government, his intention of not becoming an employee of the Corporation.

(2) In making an order under sub-section (1), the Central Government shall, as far as may be, take into consideration the functions which the Central Government has ceased or ceases to perform and the areas in which such functions have been or are performed.

(3) An officer or other employee transferred by an order made under sub-section (1) shall, on and from the date of transfer, cease to be an employee of the Central Government and become an employee of the Corporation with

such designation as the Corporation may determine and shall, [subject to the provisions of sub-sections (4), (4A), (4B), (4C), (5) and (6)], be governed by the regulations made by the Corporation under this Act as respects remuneration and other conditions of service including pension, leave and provident fund, and shall continue to be an officer or employee of the Corporation unless and until his employment is terminated by the Corporation.

(4) Every officer or other employee transferred by an order made under sub-section (1) shall, within six months from the date of transfer, exercise his option in writing to be governed,--

(a) by the scale of pay applicable to the post held by him under the Government immediately before the date of transfer or by the scale of pay applicable to the post under the Corporation to which he is transferred.

(b) by the leave, provident fund, retirement or other terminal benefits admissible to employees of the Central Government in accordance with the rules and orders of the Central Government as amended from time to time or the leave, provident fund or other terminal benefits admissible to the employees of the Corporation under the regulations made by Corporation under this Act, and such option once exercised shall be final:

Provided that the option exercised under

clause (a) shall be applicable only in respect of the post to which such officer or employee is transferred to the Corporation and on appointment to a higher post under the Corporation, he shall be eligible only for the scale of pay applicable to such higher post:

Provided further that if immediately before the date of his transfer any such officer or employee is officiating in a higher post under the Government either in a leave vacancy or in any other vacancy of a specified duration, his pay, on transfer, shall be protected for the unexpired period of such vacancy and thereafter he shall be entitled to the scale of pay applicable to the post under the Government to which he would have reverted or to the scale of pay applicable to the post under the Corporation to which he is transferred, whichever he may opt:

Provided also that when an officer or other employee serving in the Department of the Ministry of the Central Government dealing with food or in any of its attached or subordinate offices is promoted to officiate in a higher post in the Department or office subsequent to the transfer to the Corporation of any other officer or employee senior to him in that Department or office before such transfer, the officer or other employee who is promoted to officiate in such higher post shall, on transfer to the Corporation, be entitled only to the scale of pay applicable to the post he

would have held but for such promotion or the scale of pay applicable to the post under the Corporation to which he is transferred, whichever he may opt.

[(4A) Notwithstanding anything contained in sub-section (4)--

(a) every officer or other employee in respect of whom an order of transfer under sub-section (1) had been made before the date of commencement of the Food Corporations (Amendment) Act, 1977 (hereafter in this section referred to as the appointed day) shall, whether or not he had exercised the option under sub-section (4) before the appointed day, exercise such option within six months from the appointed day; and

(b) every officer or other employee in respect of whom an order of transfer under sub-section (1) may be made after the appointed day shall, within six months from the date or such order, exercise his option under sub-section (4),

and in each such option once exercised shall be final:

Provided that where an officer or other employee having exercised an option under sub-section (4) before the appointed day--

(i) has died or retired before the appointed day,

or dies or retires after the appointed day, before exercising the option as required by this sub-section, or

(ii) does not exercise the option as required by this sub-section, the option already exercised by him shall be deemed to have been validly exercised by him under sub-section (4).

(4B) Where an officer or other employee--

(a) has died or retired, or dies or retires, after an order of transfer under sub-section (1) in respect of such officer or other employee is made but before exercising the option under sub-section (4) or, as the case may be, as required by sub-section (4A); or

(b) has died or retired, or dies or retires, before an order of transfer under sub-section (1) in respect of such officer or other employee is made, he shall, notwithstanding anything contained in sub-section (4) or sub-section (4A),--

(i) in a case falling under clause (a), be deemed to have exercised an option under sub-section (4); and

(ii) in a case falling under clause (b), be deemed to have been transferred under sub-section (1) and exercised and option under sub-section (4), to be governed by the leave,

provident fund, retirement or other terminal benefits admissible to the employees of the Central Government in accordance with the rules and orders of the Central Government as amended from time to time:

Provided that nothing in clause (a) of this sub-section shall apply to an officer or other employee who has, before the appointed day, been paid the terminal benefits as admissible to the employees of the Corporation under the regulations made by the Corporation under this Act, unless such officer or other employee refunds in a lump sum within six months from the appointed day the amount of contributions made by the Corporation towards such terminal benefits:

Provided further that nothing in clause (b) of this sub-section shall apply to an officer or other employee who has intimated, under the proviso to sub-section (1), his intention of not becoming an employee of the Corporation.

(4C) Where an officer or other employee has exercised an option under sub-section (4), or exercises, or is deemed to have exercised, an option under that sub-section, read with sub-section (4A) or sub- section (4B), to be governed by the leave, provident fund, retirement or other terminal benefits admissible to the employees of the Central Government, such benefits shall be calculated on the basis of

the pay and allowances drawn by him in the Corporation.]

(5) No officer or other employee transferred by an order made under sub-section (1),--

(a) shall be dismissed or removed by an authority subordinate to that competent to make a similar or equivalent appointment under the Corporation as may be specified in the regulations made by the Corporation under this Act;

1*[(b) shall be dismissed or removed or reduced in rank except after an inquiry in which he has been informed of the charges against him and given a reasonable opportunity of being heard in respect of those charges:]

2*[Provided that where it is proposed after such inquiry, to impose upon him any such penalty, such penalty may be imposed on the basis of the evidence adduced during such inquiry and it shall not be necessary to give such person any opportunity of making representation on the penalty proposed:]

1*[Provided further that] this clause shall not apply,--

(i) where an officer or employee is dismissed or removed or reduced in rank on the ground of conduct which has led to his conviction on a criminal charge; or

(ii) where the authority empowered to dismiss or remove an officer or employee or to reduce him in rank is satisfied that for some reason, to be recorded by that authority in writing, it is not reasonably practicable to hold such inquiry; or

(iii) to an officer or employee who, after transfer to the Corporation, is appointed to a higher post under the Corporation in response to an open advertisement and in competition with outsiders.

(6) If, in respect of any such officer or employee as aforesaid, a question arises whether it is reasonable practicable to hold such inquiry as is referred to in sub-section (5), the decision thereon of the authority empowered to dismiss or remove him or to reduce him in rank shall be final.

(7) Nothing contained in sub-section (1) shall apply to the members of the Central Secretariat Service or any other service or to persons on deputation to the Department referred to in that sub- section or to any of its attached or subordinate offices from any Ministry of the Central Government or from any State Government or from any organisation.]

3. Learned counsel for the appellant specifically drew our attention to sub-section 4A and submitted that the appellant in 1974 had opted for leave, provident fund, retirement and other terminal benefits as admissible to Central Government employees and had scored off the option to be paid leave, provident fund, retirement and other terminal benefits admissible to employees of the Corporation. It was submitted that in terms of proviso (ii) to Section 12A (4A) of the Act the option exercised in 1974 was valid and binding notwithstanding the fact that the appellant had not specifically exercised the option after commencement of the Food Corporation of India (Amendment) Act, 1977 (hereinafter referred to as 1977 Act, for short).

4. Section 12A of the Act is a special provision relating to pay, allowances and retirement benefits applicable to the Central Government employees who were/are transferred to the Corporation. Section 12A(1) of the Act authorises and gives legal right to transfer Central Government employees to the Corporation with effect from the dates specified in the transfer order. Sub-

Section 4 to Section 12A stipulates that every officer or an employee on his transfer shall within six months exercise his option if he wants to be paid, scale of pay and allowances as applicable to the Central Government employees and also leave, provident fund, retirement and other terminal benefits as admissible to the employees of the Central Government. On failure to do so, the Central Government employee on transfer to the Corporation was/is to be paid the pay and allowances as well as retirement and terminal benefits payable as per the Rules and Regulations of the Corporation. This is natural as on transfer to the Corporation, the employee ceases to be an employee of the Central Government and becomes an employee of the Corporation. Section 12A(4) of the Act however gives an option to such employees to opt for the central government pay and allowances and retirement benefits even on transfer to the corporation. This option however has to be exercised within six months of transfer. On failure to exercise the option the employee is entitled to pay and allowances as well as retirement benefits payable as per Rules and Regulations of the Corporation and not

those payable to the employees of the Central Government.

5. Section 12A(4B) of the Act supports and does not in any manner negate or go against the above interpretation. Clause (a) to section 12A(4B) of the Act applies when after the transfer order is made, the employee dies or retires before exercising his option as per section 12A(4) or 12A(4A) of the Act. This obviously is with reference to the period of six months mentioned in sections 12A(4) and 12A(4A) of the Act. After period of six months as mentioned in Section 12A(4) and 12A(4A), has expired clause (a) to section 12A(4B) of the Act will have no application. Option under sections 12A(4) and 12A(4A) has to be exercised within six months. It cannot be exercised thereafter. Section 12A(4B) clause (b) applied when a central government employee working with the Corporation dies or retires before an order of transfer of his services is made under 12A(1) of the Act. In such cases the employee though working with the Corporation continues to be a central government employee and therefore retirement and terminal benefits as admissible to the Central government are payable.

6. Section 12A (4A) was enacted by the Food Corporation of India (Amendment) Act, 1977. It may be relevant to state here that the Third Central Pay Commission had made some recommendations for providing relief to Government pensioners. Office memorandums were also issued by the Ministry of Finance for granting some benefits to erstwhile employees and employees of the Central Government who had been absorbed in public sector. Section 12A (4A) is a non-obstante clause and gives right to every officer or employee who was transferred before the commencement of Food Corporations (Amendment) Act, 1977, under Section 12A(1) of the Act, from the Central Government to the Corporation, to exercise option under Sub-Section 4 of Section 12A within six months from the date of commencement of the amendment Act. Therefore, a Central Government employee, who was transferred to the Corporation before Food Corporations (Amendment) Act, 1977 (also referred to in the section as the appointed date) was given a second chance to opt for pay and allowances and/or retirement benefits payable to the Central Government employees. This option

was to be exercised within a limited period of six months w.e.f. commencement of the amendment Act, 1977. Clause (b) to Section 12A (4A) of the Act applies to any officer transferred after the appointed date. In such cases, the Central Government employee transferred to the Corporation after the appointed date is required to exercise his option within six months from the date of the transfer order. The said amendment was required as under section 12A(4) of the Act, option once exercised could not changed.

7. Proviso (ii) to Section 12A (4A) of the Act applies to officers mentioned in clause (a) of the said Sub-Section. The said clause applies to every officer or an employee in respect of whom order of transfer has been made in Sub-Section 12A (1) before the appointed date i.e. date of commencement of 1977 Act. Thus, where an officer or an employee had been transferred to the said Corporation before the appointed date, the option exercised by him in terms of proviso (ii) shall be deemed to have been validly exercised. An officer who was transferred to the corporation before the appointed date and had already exercised his option was given

a chance to change his option with six months of the appointed date. An option exercised earlier continued to be valid unless second option was exercised as per section 12A(4A) of the Act. Sub-Section 4A to Section 12A is a non obstante clause which gives an option to employees who had been transferred before the commencement of the 1977 Act to exercise their option once again. However, in cases where option was not exercised for the second time, the option exercised earlier was deemed to have been validly exercised.

8. Section 12A(4A) is not applicable to the appellant because he was transferred as an employee of the Corporation on 11th August, 1978. He was not transferred as an employee of the Corporation before commencement of the 1977 Act i.e. the appointed date. Proviso (ii) to Sub-Section 4A to Section 12A applies only to employees who have been transferred from the Corporation before the appointed date.

9. The respondent Corporation had alongwith the additional affidavit filed a Gazette Notification containing the appellant`s name which

establishes and proves that the appellant was transferred from Central Government to the Corporation only on 11th August, 1978. In fact alongwith the Writ Petition, the appellant-petitioner had also enclosed letter dated 21st August, 1975 written by the Regional Director returning the option form submitted by the appellant and others as they had not been transferred to the Corporation. The said letter also records that the said employees including the appellant could exercise their options when their names are notified in the Gazette Notifications.

10. The contention of the appellant that he was not aware of the Gazette Notification by which he was transferred as an employee of the Corporation, w.e.f. 11th August, 1978 is difficult to believe. Several employees were transferred by the same notification and it was an important event in the service career of the appellant. The appellant was not the only person who was transferred by the Gazette Notification. Several others were also transferred along with him. It is also apparent that Gazette Notifications were being issued from time to time transferring employees who were earlier working in

the Food Department of Government of India to the Corporation. It may be relevant to state here that the learned Single Judge in paragraph 26 of the impugned judgement has specifically referred to a registered letter written to the appellant requiring him to exercise his option. We may also mention here that the appellant in his representation dated 1st August, 1991 had admitted that he was aware of the communication dated 21st August, 1975. Similarly in letter dated 13th September, 1991 the appellant admitted that his services were transferred to the Corporation vide Gazette Notification dated 11th August, 1978.

11. It was the right of the appellant to exercise the option in case he wanted to be paid retirement and terminal benefits as applicable to the Central Government employees within six months from the date of his transfer i.e. 11th August, 1978. Admittedly, that was not done. Therefore, the appellant cannot claim retirement and terminal benefits as applicable to the Central Government employees. In view of the above, we do not find any merit in the present Appeal. Impugned Order passed by the learned Single Judge is in

accordance with law and calls for no interference.

12. In the facts and circumstances of the case, there will be no order as to costs.

(SANJIV KHANNA)
JUDGE

(DR. MUKUNDAKAM SHARMA)
CHIEF JUSTICE

February 9, 2007

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